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 7 BANK OF AMERICA, N.A.

8 UNITED STATES DISTRICT COURT  
 9 CENTRAL DISTRICT OF CALIFORNIA

10  
 11 EDWARD IVAN GUARDIA,

12 Plaintiff,

13 v.

14 AFFINIA DEFAULT SERVICES, LLC,  
 a California organization, with  
 15 California registered agent (C3730769);  
 Bank of America National Association;  
 16 Wells Fargo Bank, National  
 Association; DOES 1 to 100, inclusive,

17 Defendants.

CASE NO.: 2:18-cv-08965-DSF-GJS

**DEFENDANTS WELLS FARGO  
 AND BANK OF AMERICA'S  
 REPLY IN SUPPORT OF THE  
 MOTION TO DISMISS**

Date: December 3, 2018<sup>1</sup>  
 Time: 1:30 p.m.  
 Ctrm: 7D

[Assigned to the Hon. Dale S. Fischer]

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 26 <sup>1</sup> Following plaintiff's filing of an untimely opposition brief, the Court entered an  
 27 order extending Wells Fargo and U.S. Bank's time to file a reply brief until  
 28 December 3, 2018, the original hearing date. (Doc. 17). The motion to dismiss  
 will be taken under submission upon the filing of the reply brief, and there will be  
 no oral argument on the matter unless otherwise ordered by the Court. *Id.*

## 1. INTRODUCTION

Much like plaintiff's complaint in this case, his untimely opposition brief (Doc. 19) is a confusing and vague pleading. The opposition fails to cite a single authority in opposition to Wells Fargo and Bank of America's motion to dismiss (Doc. 9) ("MTD"), makes numerous inflammatory statements about defense counsel, and improperly includes numerous allegations and attached documents outside of the complaint. If anything, the opposition reveals that the defendants' arguments in the MTD are meritorious, and that the case should be dismissed with prejudice.

## 2. THE OPPOSITION IS AN IMPROPER ATTEMPT TO BOLSTER AND/OR ADD CLAIMS TO THE COMPLAINT

As an initial matter, the opposition contains numerous claims and allegations that are outside of the complaint. For example, as best as defense counsel can determine, plaintiff advances at least seven theories based on claims and allegations not in the complaint:

- Violation of Civil Code §2932.5 (Oppo. at 3:4-15);
- Breach of oral contract not to "conduct an Auction sell in his house until the Court Action BC611064 finished including if it goes to Appeal" (Oppo. at 3:16-5:3; 7:19-21);
- Lack of authority by Affinia Default Services to act as foreclosure trustee (Oppo. at 5:1-7);
- Invalidity of the loan modification and the subsequent foreclosure process (Oppo. at 5:8-6:13);
- Some claim related to an "illegal credit card" (Oppo. at 6:25-26);
- Failure to respond to qualified written requests by plaintiff (Oppo. at 6:26-7:6; 9:2-17);
- Some sort of claim based on credit reporting (Oppo. at 10:17-25).

These "claims" are often supported by additional allegations not present in

1 the original complaint, and the opposition attaches many exhibits, most of which  
 2 are not subject to judicial notice and/or do not pertain to the claims in the  
 3 complaint. (Oppo. Exs. A-E). In addition, plaintiff greatly augments his factual  
 4 allegations in other places in the opposition. (See Oppo. at 7:8-8:25). However,  
 5 the confusing nature of the opposition makes it impossible to tease out every new  
 6 claim and allegation in the opposition.

7 While the defendants would have numerous meritorious defenses to these  
 8 claims and allegations had they been raised in the complaint, they were not, and  
 9 need not be addressed in this reply. The attempt to introduce new claims,  
 10 allegations, and evidence on opposition is totally improper, and should be  
 11 disregarded. See *McKinney v. Bank of Am. N.A.*, 2016 U.S. Dist. LEXIS 145007,  
 12 \*11, FN4 (S.D. Cal. Apr. 29, 2016) (“Plaintiff argues in her opposition that  
 13 Defendant failed to timely respond to her QWR. However, this allegation is not  
 14 included in her TAC and it is improper for Plaintiff to attempt to bolster or  
 15 add factual allegations in her opposition.”).

16 **3. THE OPPOSITION FAILS TO DEMONSTRATE THAT THE**  
 17 **COMPLAINT DOES NOT VIOLATE RULE 8, NOR THAT THE**  
 18 **MAJORITY OF THE COMPLAINT IS NOT BARRED BY RES**  
 19 **JUDICATA**

20 The complaint is almost totally devoid of any factual allegations. Virtually  
 21 every claim is premised on a series of ambiguous conclusions that fail to allege the  
 22 who, what, when, or how of the harm that plaintiff supposedly suffered. (MTD  
 23 §3). Further, longstanding jurisprudence establishes that any claim that was or  
 24 could have been brought prior to entry of judgment in the Second Action on March  
 25 27, 2018 is barred by the doctrine of res judicata and/or collateral estoppel. (MTD  
 26 §4). A review of the allegations and judicially noticeable facts cannot reasonably  
 27 lead to any other conclusion.

28 The opposition does not actually refute these arguments. (Oppo. at 6:15-

7:6). Rather, the opposition attempts to improperly augment the complaint’s “factual” allegations, but only manages to make the claims more convoluted. If anything, the opposition only supports the conclusion that the complaint violates Rule 8, and that the almost any conceivable claim is barred by res judicata. Even where plaintiff attempts to allege additional facts to get around the res judicata issue, many of the facts alleged arose well before entry of judgment in the Second Action.

If the Court is inclined to grant plaintiff leave to amend the complaint, it should only extend such opportunity to plaintiff on the condition that he allege facts rather than conclusions, and clarify exactly what his claims are. Further, plaintiff must allege specifically that the claims arose after entry of judgment in the Second Action on March 27, 2018.

#### **4. PLAINTIFF HAS ABANDONED THE HBOR CLAIMS**

As discussed in the MTD, the first two claims for violations of various provisions of HBOR suffer from numerous fatal defects. Namely:

- The claims are pled too indefinitely to invoke statutory remedies (MTD §5(A));
- Due to plaintiff’s long prior history of loss mitigation reviews, he is no longer entitled to the protections of HBOR (MTD §5(B));
- The complaint fails to allege any “material” violations of HBOR (*Id.*);
- The Section 2923.5 claim fails because it is barred by the three year statute of limitations, and compliance with the statute has been established by previous judicial proceedings (MTD §5(C)(i));
- The Section 2923.6/2924.18/2924.11 dual tracking allegations fail because the statute was never triggered post Second Action (MTD §5(C)(ii));
- The Section 2923.7 claim fails to allege that plaintiff ever specifically requested a single point of contact, or that any single point of contact

1 ever failed to properly carry out that role (MTD §5(C)(iii)).

2 Each of the above arguments is supported by ample analysis of the  
3 complaint's allegations and case authority. Yet the opposition does not even  
4 mention those claims, let alone try to raise any counter-authority.

5 By failing to oppose the MTD, plaintiff has abandoned the unmentioned  
6 claims, and they should be dismissed with prejudice. *Hall v. Mortgage Investors*  
7 *Group*, 2011 U.S. Dist. LEXIS 105999, \*15-\*16 (E.D. Cal. Sept. 16, 2011)  
8 (discussing failure to oppose a statute of limitations argument as conceding the  
9 truth of the argument); *Marin Alliance for Med. Marijuana v. Holder*, 2012 U.S.  
10 Dist. LEXIS 96283, \*32 (N.D. Cal. July 10, 2012) ("Plaintiffs have failed to  
11 oppose Defendants' motion with respect to this claim, which the Court construes as  
12 Plaintiffs' absence of dispute with Defendants' arguments and an abandonment of  
13 the claim."); *citing Walsh v. Nev. Dep. of Human Res.*, 471 F. 3d 1033, 1037 (9th  
14 Cir. 2006).

## 15 **5. THE OPPOSITION FAILS TO RESUSCITATE THE EQUITABLE** 16 **CLAIMS**

17 The third and fourth claims for declaratory and injunctive relief rely on  
18 several disparate theories, each of which are addressed in the MTD:

- 19 • Plaintiff cannot bring any claim based on securitization of the loan  
20 because he specifically agreed at origination that the loan could be  
21 securitized, and fails to allege any prejudice arising from any  
22 supposed securitization (MTD §6(A));
- 23 • The HBOR basis for the claims fails for reasons already discussed  
24 (MTD 15:26-27);
- 25 • Paragraph 22 of the deed of trust was not breached because a notice of  
26 default was recorded, plaintiff alleges no damages, and it was plaintiff  
27 who breached the contract in the first instance (MTD §6(B));
- 28 • The provision of RESPA plaintiff complains of was not in force when

the notice of default was recorded, does not apply to a notice of sale in any event, and the complaint alleges no damages (MTD §6(C));

- The complaint does not present any legitimate challenge to the default amount, the notice of default, or the notice of sale (MTD §6(D));
- Declaratory and injunctive relief are remedies, not independent claims (MTD §6(E));
- The complaint fails to allege tender of the debt or any valid reason why tender should not be required (MTD §7(F)).

As with the HBOR claims, each of these points is supported by controlling authorities and analysis of the complaint. While the opposition ostensibly discusses these points, it does not raise any authorities to counter the defendants' arguments. (Oppo. at 9:2-25). In fact, much of the opposition's discussion of these "claims" raises issues outside of the complaint or completely unrelated to the complaint's allegations.

In effect, plaintiff has not opposed any of defendant's arguments. This is an admission that the defendants' arguments are meritorious, and that the MTD should be granted. *Hall*, 2011 U.S. Dist. LEXIS 105999 at \*15-\*16. The claims should be dismissed with prejudice.

#### **6. THE OPPOSITION FAILS TO STATE A VALID REASON WHY PLAINTIFF IS ENTITLED TO AN ACCOUNTING**

Plaintiff has no right to an accounting because he is admittedly in default on the loan, and there is no fiduciary relationship between plaintiff and any defendant. (MTD §7). The opposition states nothing to the contrary. (Oppo. at 10:2-8). This concedes the arguments to the defendants. *Hall*, 2011 U.S. Dist. LEXIS 105999 at \*15-\*16. Dismissal with prejudice is warranted.

#### **7. THE UCL CLAIM FAILS FOR THE REASONS STATED IN THE MTD**

While the final claim, arising under the UCL, is fatally unclear, it appears to

be based on some fraud theory, as well as the other claims in the complaint. There are three major problems with the claim: (1) plaintiff lacks standing under the statute because he fails to allege the loss of any money or property (MTD §8(A)); (2) the predicate acts forming the basis of the claim are not pled with particularity (MTD §9(B)); and (3) since the other claims in the complaint are fatally defective, they cannot support a UCL claim. (MTD §8(C)).

The opposition discusses, but does not actually refute, some of these points. (Oppo. at 10:10-25). As with all the opposition's other arguments, not a single case is raised or discussed. The opposition yet again effectively fails to oppose the MTD, and it should be granted with prejudice. *Hall*, 2011 U.S. Dist. LEXIS 105999 at \*15-\*16.

#### **8. PLAINTIFF'S CHALLENGES TO THE REQUEST FOR JUDICIAL NOTICE IS OF NO MOMENT**

Throughout the opposition, plaintiff states that several documents attached to the request for judicial notice in support of the MTD (Doc. 9) ("RJN") "should be stricken", or some variation thereof. (*See i.e.* Oppo. at 5:8-9). It is unclear in these instances whether plaintiff is challenging the RJN (i.e. the noticeability of the documents), or whether plaintiff is seeking a judicial determination voiding these documents.

If it is the former, there is no valid basis. Each of the exhibits to the RJN are judicially noticeable documents for the reasons set forth in the RJN, and plaintiff cites no authority to the contrary. If it is the latter, then this is yet another improper attempt to augment the complaint through an opposition brief, and should be disregarded.

#### **9. PLAINTIFF'S ISSUE WITH THE MEET AND CONFER IS UNFOUNDED**

As a final matter, plaintiff spends an entire page (or more) of the opposition on the meet and confer prior to filing the MTD. (Oppo. at p.2). If anything,



1 plaintiff's "transcription" of the voicemail left by defense counsel demonstrates the  
2 defendants' compliance with L.R. 7-3.

3 To the extent that plaintiff takes issue with the supposed reference to U.S.  
4 Bank in the voicemail casting doubt on defense counsel's representation of Bank  
5 of America, that is totally unfounded. Plaintiff relies on an unverified transcription  
6 of unknown origin, and any such reference to U.S. Bank, if it did occur, was  
7 inadvertent. Further, all of the defendants' papers in this case properly referenced  
8 Bank of America, and plaintiff has not demonstrated any way in which he was  
9 prejudiced.

### 10 **10.CONCLUSION**

11 The complaint in this action is fatally unclear, denying the defendants proper  
12 notice of what they are being accused of, is facially barred by res judicata, and  
13 states no claims in any event. The opposition brief only adds to the confusion  
14 sewed by the complaint. For all the reasons stated in the MTD, and those above,  
15 the Court should dismiss the complaint with prejudice. If the Court is inclined to  
16 grant plaintiff leave to amend, it should be conditioned on plaintiff alleging facts  
17 that clearly identify his claims, and only in the event the claims arose after March  
18 27, 2018.

19 Respectfully submitted,

20 Dated: December 1, 2018

21 ANGLIN, FLEWELLING, RASMUSSEN,  
22 CAMPBELL & TRYTTEN LLP

23 By: /s/ Scott T. Reigle

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26 Attorneys for Defendants  
27 WELLS FARGO BANK, N.A., and BANK  
28 OF AMERICA, N.A.



**CERTIFICATE OF SERVICE**

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of Pasadena, California; my business address is Anglin, Flewelling, Rasmussen, Campbell & Trytten LLP, 301 N. Lake Ave, Suite 1100 Pasadena, CA 91101-4158

On the date below, I served a copy of the foregoing document entitled:

**DEFENDANTS WELLS FARGO AND BANK OF AMERICA'S REPLY IN SUPPORT OF THE MOTION TO DISMISS**

on the interested parties in said case as follows:

**Served By Means Other than  
Electronically Via the Court's  
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made. This declaration is executed in Pasadena, California on December 3, 2018.

Carol Leach

(Type or Print Name)

/s/ Carol Leach

(Signature of Declarant)